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No. 09-430

SUPREME COURT, U.S.
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In the Supreme Court of the United States

RAKESH WAHI, M.D.,

Petitioner,

v.

CHARLESTON AREA MEDICAL CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondent CAMC effectively concedes all of the elements of our showing that the Court should grant the petition on both questions presented. And it offers no plausible reason why this Court should *not* grant review, or why this case is not a suitable vehicle for resolving both questions—which, as CAMC also does not dispute, are questions of great importance to the Nation's healthcare system and to the patients and doctors who participate in it.

I. CAMC offers no serious response to our showing of a conflict as to the availability of immunity for summary suspensions imposed without imminent danger.

CAMC's most important concession concerns the requirement imposed by the Health Care Quality Improvement Act ("HCQIA") that, to obtain immunity under the non-emergencies provision, "a health care entity * * * must act '*after* adequate notice and hearing procedures * * * *or after* such other procedures as are fair * * * under the circumstances.'" Opp. 16-17 (quoting § 11112(a)(3)); emphases in original). Having conceded that central premise, CAMC attempts to explain away the conflict on the first issue by claiming, initially, that the Fourth Circuit didn't actually hold that a hospital can obtain immunity under this provision based on *post*-suspension procedures. But then, after eventually conceding that the Fourth Circuit *did* so hold, CAMC argues (contradicting its position below) that the holding doesn't really matter because the Fourth Circuit *could* have ruled on the basis of the emergencies provision. Neither argument undermines

our showing that this Court should grant review of the first question presented.

1. In immunizing CAMC, as we showed, the Fourth Circuit relied extensively on procedures purportedly offered to Dr. Wahi after his suspension. Pet. 15-16, 18. To be sure, *before* the suspension, as CAMC points out (at 17-18), CAMC and Dr. Wahi exchanged letters and held some informal meetings. But at that point CAMC did "not mention a possible suspension." Pet. 22a. To the contrary, CAMC "scheduled a meeting with Wahi for August 3, 1999," Pet. 6a, but then suspended him on July 30—five days before the meeting, *ibid.* On that day, CAMC notified Dr. Wahi that his privileges were "hereby summarily suspended." *Ibid.* It is no wonder, then, that the Fourth Circuit, the district court, and CAMC itself consistently describe Dr. Wahi's suspension as "summary." Pet. 45a ("summary"); Pet. 6a, 12a ("summarily"); Opp. 1, 8, 19 ("summary," "summarily," "summarily").

Given the summary character of Dr. Wahi's discipline, it is not surprising that the Fourth Circuit relied heavily on procedures allegedly provided *after* the suspension. In contrast to the two paragraphs devoted to Dr. Wahi's pre-suspension interactions with CAMC, the court devoted twelve paragraphs to the period post-suspension. See Pet. 23a-31a. And ultimately, the court held that any pre-suspension infirmities were cured by offering Dr. Wahi a hearing *after* the suspension: "Had Wahi proceeded to a [post-suspension] hearing, any complaint about the inadequacy of notice, defective witness list or discovery, the composition of the hearing panel, the conduct of the hearing, or other relevant issues could

have been addressed and subjected to judicial review." Pet. 30a.

Indeed, so heavy was the Fourth Circuit's reliance on post-discipline process that even CAMC ultimately concedes that it was part of the court's holding. "The Fourth Circuit also engaged," CAMC admits, "in a detailed discussion and analysis of the facts *subsequent* to Wahi's July 30, 1999 suspension," and "clearly *holds* that fair procedures were provided to Dr. Wahi both before *and after* his suspension." Opp. 18 n.5, 16 (some emphasis omitted; other emphasis added); see also *id.* at 18 n.5 (court below "considered all of the proceedings * * * before *and after* the suspension") (emphasis added).

2. Under the HCQIA's non-emergencies provision, however, immunity for summary discipline cannot be based even partially on post-discipline procedures. The statute forbids it. Again, as CAMC admits, "a health care entity seeking HCQIA immunity must act '*after* adequate notice and hearing procedures are afforded to the physician involved *or after* such other procedures as are fair to the physician under the circumstances.'" Opp. 16-17 (quoting § 11112(a)(3); emphases in original).

Of course, there *is* an HCQIA provision that provides immunity based on procedures "subsequent" to the discipline: the "emergencies" provision. § 11112(c)(2). That provision, however, requires the presence of possible "imminent danger." *Ibid.* But as the Fourth Circuit itself pointed out, [redacted]

[redacted]*

CAMC's own concessions thus establish that the Fourth Circuit simply rewrote the statute. By relying on post-discipline procedures, it now grants hospitals immunity for summary suspensions that can be immunized only under the emergencies provision—yet without any showing of possible "imminent danger." This is an egregious error—worthy, if the Court so chose, of summary reversal.

3. Contrary to CAMC's assertion (Opp. 20-30), moreover, four other circuits would have come out the other way. All four hold that the HCQIA emergencies provision can be satisfied only upon a showing of possible "imminent danger"; and none conducts an analysis under the non-emergency provision using *post*-discipline procedures.

To begin with, CAMC simply ignores the holding of *Poliner*, in which the Fifth Circuit "conclude[d] that the [discipline] falls within [the emergency provision's] curtilage"—but only because the hospital was "fully warranted in concluding that failing to impose [the discipline] 'may result' in an imminent danger." 537 F.3d at 381-382. True, having found the possibility of imminent danger, the court further accepted the saving argument that the discipline had also been "imposed after such other procedures as are fair under the circumstances." *Id.* at 383 (quotations omitted). But that is unremarkable: Where a court finds a "health emergency" based on the possibility of "imminent danger" under § 11112(c)(2), lim-

* Bold brackets show material redacted by the Fourth Circuit

iting the procedures available before discipline might well be "fair" under the circumstances. See *id.*

But here, the Fourth Circuit avoided any finding of imminent danger and then simply announced that, even *without* such danger, hospitals can skimp on pre-discipline procedures so long as they offer a hearing later. As our petition explains, this turns the statute on its head. Pet. 23.

Nor does CAMC have any plausible answer to *Sugarbaker*. CAMC claims that "[a] fair reading" of that decision shows "the Eighth Circuit would have upheld the granting of summary judgment in the instant case under *either* [the non-emergencies provision] or [the emergencies provision]." Opp. 25 (emphasis added). But that's far from a "fair reading." In immunizing the hospital for the doctor's summary suspension, the Eighth Circuit did not even hint at the *non*-emergencies provision. Rather, noting the possibility of imminent danger on the facts there—which were the basis for the hospital's summary suspension—the court observed that "summary suspensions, 'subject to *subsequent* notice and hearing or other adequate procedures, do not result in the loss of immunity *where the failure to take such an action may result in an imminent danger to the health of any individual.*'" 190 F.3d at 917 (emphasis added) (quoting § 11112(c)(2)).

Thus, unlike the decision below, the Eighth Circuit did not read "after" out of the non-emergencies provision or "imminent danger" out of the emergencies provision. Instead, the Eighth Circuit acknowledged the "require[ment]" of imminent danger in the *emergencies* provision, and found it satisfied. *Ibid.*

CAMC buries in a footnote (at 29 n.11) the critical holding of another conflicting decision—the Third Circuit's decision in *Brader*. There, the doctor was "on informal notice that he might be suspended," and even told his supervisor that "the only way to prevent him from performing [the procedures in question] was to suspend him." 167 F.3d at 842 n.4. Yet the Third Circuit held that the doctor did not have "advance warning" of his suspension and thus analyzed his suspension under the emergencies provision, which it held satisfied. *Id.* at 842. Unlike the court below, the Third Circuit did not so much as mention the *non*-emergencies provision, much less rewrite the emergencies provision to justify immunity absent imminent danger.

Finally, CAMC badly misreads the history of the Ninth Circuit's decision in *Fobbs*. CAMC claims that the district court's decision primarily focused on the non-emergencies provision. Opp. 27 n.9. But in fact, the district court set out to consider both prongs of the *emergencies* provision—namely, whether the defendants "believed the [discipline] was necessary to protect patient safety" and "that they gave plaintiff adequate notice and hearing procedure after the [discipline] commenced." 789 F. Supp. at 1067. But having thus framed the issue, the district court there, like the court below, blessed the procedures as adequate without finding the possibility of imminent danger.

The Ninth Circuit corrected the oversight, holding that "[t]he record of the problems caused by [the doctor at issue] clearly supports the conclusion * * * that a summary restriction be taken to avoid imminent danger." 29 F.3d at 1443. By finding summary

procedures adequate in the *absence* of imminent danger, the Fourth Circuit thus made the same error as the district court in *Fobbs*. And the Ninth Circuit's correction of that error thus sets that court at odds with the Fourth.

In sum, CAMC has done nothing to undermine our showing that the court below created a split with four other circuits.

4. Having effectively conceded the Fourth Circuit's mistaken reading of the HCQIA, for the first time CAMC attempts to satisfy the imminent danger requirement of the *emergencies* provision. Opp. 30-32. But CAMC stops short of asserting that its late claim would prevent this Court from reaching this issue, or otherwise makes this case an unsuitable vehicle for resolving it. And the reason is that CAMC conceded below that it was *not* relying on any possibility of imminent danger (Pet. 81a), and therefore the Fourth Circuit [redacted].

At this point, of course, CAMC cannot retract its concession, which it boldly announced below in a heading in its merits brief. After making clear that it was relying on the *non*-emergencies provision, CAMC stated: "**CAMC did not violate *** HCQIA by suspending [Dr. Wahi] without a prior finding that he posed an imminent danger to patients.**" Pet. 81a (emphasis in original). And the Fourth Circuit took the cue, noting that [redacted]

Having induced the court below to adopt CAMC's position, CAMC cannot change its position without violating settled principles of judicial estoppel, *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001), and the rule that arguments not presented below are waived, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

But even if CAMC's retraction were allowed, that would not change the *holding* of the decision below, which, as we have shown, allows summary suspensions in the absence of imminent danger. This Court's prompt review is needed to correct that error, and to resolve the resulting circuit split.

II. CAMC effectively concedes the conflict on the right to a jury trial under the HCQIA, and cannot explain why this case is not a good vehicle to resolve that conflict.

CAMC also effectively concedes the key elements of our showing that the Court should grant the petition on the second question presented. CAMC does not dispute that there is a sharp, recognized conflict among the circuits over the right to a jury trial under the HCQIA (Opp. 32-33), and cannot dispute that this case is a sound vehicle for resolving that split.

1. As shown in the petition, according to the First Circuit in *Singh*, the HCQIA "contemplates a role for the jury, in an appropriate case, in deciding whether a defendant is entitled to HCQIA immunity." 308 F.3d at 33. Only "if * * * no reasonable jury could find that the defendant * * * failed to meet the HCQIA standards [does] the entry of summary judgment do[] no violence to the plaintiff's right to a

jury trial." *Id.* at 36. In so reasoning, the First Circuit squarely rejected the Eleventh Circuit's contrary rule that, "*[u]nder no circumstances* should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury." *Bryan*, 33 F.3d at 1333 (emphasis added). That rule, the First Circuit observed, is in "contradiction of the other circuits' holding that a jury *may* in principle make a HCQIA immunity determination." *Singh*, 308 F.3d at 35 n.7 (emphasis added). And the First Circuit specifically identified *Bryan* as being in "contradiction" not only of its own holding in *Singh*, but also of the Tenth Circuit's decision in *Brown* v. *Presbyterian Healthcare Services*, 101 F.3d 1324, 1334 n.9 (10th Cir. 1992). CAMC cannot and does not dispute that the First Circuit has correctly identified a square circuit split.

Nor does CAMC offer any serious response to our showing that the decision below exacerbated this pre-existing split. To be sure, as CAMC points out (at 32-33), the court below did not expressly state that a jury trial is never available where a hospital invokes immunity under the HCQIA. However, as the petition explained (at 26-33), the Fourth Circuit's application of the statutory presumption of immunity—especially where the court acknowledged the very facts that would ordinarily have created a jury question on the availability of immunity—effectively guarantees that a jury trial could never be had under that court's reasoning. That usurpation of the jury's role is what First and Tenth Circuits decry, but what the Eleventh Circuit and Colorado Supreme Court require. With the addition of the Fourth Circuit to those latter two courts, the split is now 3-2—and counting.

2. Any doubt about the existence of a conflict vanishes in light of *Brown*, which CAMC cannot begin to distinguish. See Opp. 37-38. In *Brown*, unlike in the decision below, the Tenth Circuit awarded a jury trial even though the doctor had only a single expert on his side. Yet here, the Fourth Circuit *itself* found CAMC guilty of numerous "failures" and declared its conduct "not a recommended model." Pet. 30a. And CAMC does not dispute that, the day before CAMC's chief of staff suspended Dr. Wahi, that same chief of staff *exonerated* him. Pet. 10. Nor does CAMC dispute that Dr. Wahi has been exonerated three times by the West Virginia Board of Medicine. Pet. 13 .

Those facts—from which a jury could easily rebut the statutory presumption of good faith—would undoubtedly have been sufficient to create a right to jury trial under the analysis in *Brown*. Indeed, as *Brown* recognized, to deny a jury trial on such facts would be to act "in direct contravention to Congress' intention" and "abrogate the jury's responsibility to weigh the evidence and determine the credibility of witnesses." 101 F.3d at 1334 n.9.

In short, there is a glaring and undeniable conflict between the approaches of the Tenth and Fourth Circuits, not to mention the acknowledged pre-existing conflict between the First and Eleventh Circuits.

3. Nor can there be any doubt that this case is a good vehicle for resolving the conflict. As explained, at least one Circuit—the Tenth, which required a jury trial on the facts there—clearly would have required a jury trial on the facts here. But even if this Court were to conclude that a jury trial were *not* re-

quired here, that would not prevent the Court from holding that the HCQIA does not *per se* exclude jury trials, and thereby overruling the contrary express conclusion of the Eleventh Circuit, and the contrary implicit conclusion of the court below. This case is thus an appropriate vehicle to resolve the split acknowledged by the First Circuit, and widened by the decision below.

III. CAMC cannot dispute that sham peer review is a national problem, and its own discredited allegations against Dr. Wahi highlight the seriousness of that problem.

Finally, CAMC offers no answer to petitioner's and *amici*'s showing that the decision below will exacerbate the national problem of hospital-manipulated peer review. Instead, CAMC attempts (at 4-8) to smear Dr. Wahi with self-serving and irrelevant allegations (see Pet. 4a, 44a). But those allegations are false, and merely highlight the need for this Court's intervention.

While space does not permit a full refutation of CAMC's allegations, CAMC does not dispute three facts that powerfully show Dr. Wahi's excellence as a physician, and the true context for this lawsuit:

- Based on the very charges leveled in CAMC's opposition, Dr. Wahi was investigated three times by the impartial West Virginia Board of Medicine and was exonerated every time. Pet. 13.
- CAMC's own investigation exonerated Dr. Wahi, concluding that Dr. Wahi's treatment "did *not* fall outside of his delineated clinical privileges." Pet. 10 (emphasis added).

- CAMC's investigations of Dr. Wahi began *after* he began exploring an association with surgeons at a neighboring hospital, JA 967, and CAMC later entered a consent decree with the United States pledging to halt further anti-competitive conduct in Dr. Wahi's own department, PFN 28.

Finally, as to Dr. Wahi's purported suspension by another hospital, CAMC fails to mention that this suspension was triggered by CAMC's *own* investigation, which ultimately vindicated Dr. Wahi. See JA 730, 964. CAMC's reliance on that suspension is simply one more indication that hospitals cannot be entrusted with the kind of blanket immunity that the Fourth Circuit held was required by the HCQIA.

CONCLUSION

In sum, the Fourth Circuit has bent the HCQIA beyond the breaking point. In the process, the court split the circuits on one issue and further splintered them on another. Accordingly, if the Court does not summarily reverse, it should take this opportunity to resolve these conflicts and encourage healthy competition by skilled surgeons like Dr. Wahi—competition critical to controlling healthcare costs and ensuring the best possible patient care.

Respectfully submitted,

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